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IN THE

United States Supreme Court

CYNTHIA LAMBERT,

Petitioner,

v.

GREG HARTMANN, Clerk of Courts for Hamilton County, and HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner filed a lawsuit under 42 U.S.C. § 1983 for violation of her right to privacy when a public official intentionally published her personal information, including her Social Security number and signature, on a publicly accessible government website. The publication of this personal information enabled thieves to steal Petitioner's identity, causing her economic harm and damaging her credit. The question is whether the Court of Appeals erred in concluding that Petitioner failed to state a claim for violation of her constitutional right to privacy merely because the economic harm resulting from the theft of her identity did not implicate a fundamental liberty interest?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, dated February 25, 2008, is reported at 517 F.3d 433, and is reproduced in the Appendix to this Petition (App.) at App. 1. The order of the Court of Appeals denying Petitioner's petition for rehearing en banc is reproduced at App. 41. The unreported opinion of the U.S. District Court for the Southern District of Ohio, dated December 29, 2006, is reproduced at App. 27.

STATEMENT OF JURISDICTION

The Court of Appeals entered an opinion on February 25, 2008, upholding the District Court's dismissal of Petitioners' complaint. A timely petition for rehearing en banc was denied on July 14, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

INTRODUCTION

Every year, millions of Americans fall victim to identity theft. Identity thieves steal billions in goods and services by gaining access to victims' personal information, particularly their Social Security numbers. After sapping their victims, sometimes for all they are worth, the thieves leave them to waste countless hours fighting bureaucracies to clean up the financial mess they find themselves in. This case is about whether a victim of identity theft has any remedy against a government official who feeds identity thieves a smorgasbord of personal information by intentionally posting it on the internet, fully aware of the devastating financial harm he could be causing.

Nearly 30 years ago, this Court recognized that the "interest in avoiding disclosure of personal matters" is inherent in an individual's right to privacy under substantive due process protections of the Fourteenth Amendment. *Whalen v. Roe*, 429 U.S. 589, 599, 603–04 (1977). Virtually every circuit to consider the question has applied this right to protect disclosure of such private information as medical records and financial information. In those circuits, a victim of identity theft would have a remedy against a governmental official who knowingly releases private financial information for public consumption.

The Sixth Circuit is the outlier. It refuses to protect an individual's privacy interest without a threshold showing that the violation implicates a fundamental liberty interest. In the Sixth Circuit, that threshold showing has been satisfied in only two instances: (1) where disclosure of personal information created a potential threat of bodily harm; and (2) where the information disclosed was of a sexual and humiliating nature. In this one circuit, government-facilitated financial ruin does not count as constitutionally relevant harm.

The Sixth Circuit's rule is inconsistent with this Court's approach of balancing the informational privacy interest at stake with the state's need for disclosure of the private information. *See Whalen*, 429 U.S. at 603–04; *Nixon v. Administrator of General Services*, 433 U.S. 425, 458 (1977). The result is stark: Victims of government-facilitated identity theft in the Sixth Circuit lack a remedy for gross abuses and devastating harm, whereas their counterparts in other circuits have a remedy. The confusion and disuniformity will persist unless this Court intervenes to declare a uniform approach to informational privacy claims.

STATEMENT

A Government Official Intentionally Disseminates Thousands of Social Security Numbers

Respondent Greg Hartmann, the Clerk of Courts for Hamilton County, Ohio, put hundreds of thousands of citizens at grave risk of identity

theft. At public expense, he maintained a website on which he published traffic citations. App. 28. His website permitted unfettered and anonymous public access to the name, address, date of birth, Social Security number, driver's license number, physical description, and signature of every driver who received a citation. App. 4. The information posted on each individual was more than enough to secure a drivers license, open a credit card account, and even apply for a loan. It was a veritable treasure trove for identity thieves, who could either use the information themselves or compile it and sell it on the black market.

According to the website itself, Mr. Hartmann's office processed about 50,000 traffic citations a year. CA App. 113.[1] When this lawsuit was filed, the website laid bare the personal information of individuals gathered from over 300,000 traffic citations. CA App. 76.

Mr. Hartmann was fully aware of the dangers of posting such vital personal data on the web. As early as July 2002, an identity thief pled guilty to running up $11,000 in charges in other people's names by tapping into information obtained from Mr. Hartmann's website. CA App. 131. That same year, a *New York Times* article reported about an individual whose identity had been stolen using a traffic citation obtained on

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[1] References to CA App. refer to the Appendix filed in the Court of Appeals for the Sixth Circuit.

Mr. Hartmann's website. CA App. 128. Mr. Hartmann also received several warnings in 2003 that the website was placing thousands of drivers at risk of identity theft. CA App. 287–90. Despite the warnings, Mr. Hartmann continued to post the sensitive personal financial information.

Using the Website, a Thief Steals Ms. Lambert's Identity and Hundreds of Others

Predictably, there were more casualties of Mr. Hartmann's recalcitrance. Petitioner Cynthia Lambert was one of them. In September 2004, Ms. Lambert was notified of suspicious activity on her Sam's Club and Home Depot credit accounts. App. 28. A thief made over $20,000 in unauthorized purchases using Ms. Lambert's identity. *Id.* The theft dealt a significant blow to Ms. Lambert's sterling credit. App. 29. Ms. Lambert had to invest substantial amounts of time, money, and energy to restoring her credit and safeguarding her identity from future theft. CA App. 115.

Ms. Lambert alerted Mr. Hartmann's office that her identity had been stolen using personal information obtained from his website. App. 4. The source of information was obvious from the start, because Mr. Hartmann's website incorrectly reported Ms. Lambert's driver's license number, and the thief used that same incorrect number in the scam. *Id.* Mr. Hartmann's office dismissed the concerns, insisting that it would be too time consuming and expensive to remove the citations from the website. *Id.*

The police eventually caught the culprit, an identity thief named Traci Southerland. App. 4–5. In pleading guilty, she confirmed that she ran a ring of identity thieves who mined Mr. Hartmann's website for information that would allow them to pose as others. *Id.* They stole the identities of hundreds of individuals and accrued unauthorized charges totaling over $450,000. CA App. 521. The ringleader was sentenced to 139 months. App. 5.

The District Court Dismisses Ms. Lambert's Privacy Claim

Ms. Lambert filed a complaint under 42 U.S.C. § 1983 asserting that Mr. Hartmann violated her right to privacy when he published her Social Security number and other personal information on his website. App. 31. The District Court dismissed Ms. Lambert's complaint for failure to state a claim. App. 38–39.

In doing so, the District Court acknowledged this Court's opinions in *Whalen* and *Nixon*, setting forth a balancing test to determine whether an individual's right to privacy had been violated. App. 33–34. These precedents would have required that the District Court (1) consider whether Ms. Lambert's expectation of privacy was reasonable and then (2) balance her right to informational privacy against the governmental interest in disclosing the personal information at issue. *Id.*

But the District Court felt constrained by Sixth Circuit precedent narrowly construing this

Court's precedent. App. 34–35. The District Court followed the Sixth Circuit's rule that that an individual's "right to privacy is triggered only when the interest at stake concerns 'those personal rights that can be deemed fundamental or implicit in the concept of ordered liberty.'" *Id.* (quoting *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981)). Specifically, the District Court outlined the Sixth Circuit's test for analyzing informational privacy claims as follows: "(1) the interest at stake must implicate either a fundamental right or one implicit in the concept of ordered liberty; and (2) the government's interest in disseminating the information must be balanced against the individual's interest in keeping the information private." App. 36 (citing *Bloch v. Ribar*, 156 F.3d 673, 684 (6th Cir. 1998)).

The District Court concluded that, under Sixth Circuit precedent, the only information that would satisfy the first prong of the two-step analysis was information that could create a threat of bodily integrity (e.g., disclosure of the addresses, phone numbers, driver's license and family information of undercover police officers to defendants) and the public disclosure of the details of a rape. App. 36–38 (discussing *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998), and *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998)). Against this backdrop, the District Court found that Ms. Lambert had not met the burden of pleading a violation of a right to informational privacy on the basis of allegations that she had suffered damage to her credit and

financial harm. App. 38–39.

The Court of Appeals Affirms

The Court of Appeals affirmed the dismissal of Ms. Lambert's complaint. Echoing the District Court, the Sixth Circuit acknowledged that, "in contrast to some of [its] sister circuits, [it] 'has narrowly construed the holdings of *Whalen* and *Nixon* to extend the right to informational privacy only to interests that implicate a fundamental liberty interest.'" App. 14 (quoting *Bloch*, 156 F.3d at 684). The Court of Appeals further acknowledged that it had found a fundamental liberty interest to apply only in the same two narrow contexts that the District Court outlined—(1) where the information released could lead to bodily harm; and (2) where the disclosed information was of a sexual and humiliating nature. *Id.*

While the Court of Appeals acknowledged that Congress and nearly every other circuit court has recognized a privacy interest in one's Social Security number, App. 19 (citing the Privacy Act of 1974, 5 U.S.C. § 552a), it was not persuaded that Mr. Hartmann's intentional disclosure of this information rose to the level of implicating a fundamental liberty interest. First, the Court of Appeals found that disclosure of Ms. Lambert's Social Security number and other personal information did not threaten her personal security because its disclosure did not create a serious threat of bodily harm. App. 21 (citing *Kallstrom*, 136 F.3d at 1064). It also rejected the argument that the disclosure led to

reputational injury, a fundamental liberty interest, despite the damage to Ms. Lambert's creditworthiness. App. 22. The Court of Appeals then concluded that "protection of a person's credit is a concept relating to one's finances and economic well-being, one that by its very nature bears no relationship to the kinds of interests that are 'implicit in the concept of ordered liberty.'" App. 23 (quoting *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 575 (6th Cir. 2002)).

The Court of Appeals declined to rehear this case en banc. App. 41.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari for three reasons. First, the Sixth Circuit deepened an existing split among the circuits over whether a plaintiff must meet a threshold showing that a fundamental liberty interest underlies her claim before proceeding to the balancing test set forth by this Court in *Whalen* and *Nixon*. Second, this case presents an issue of profound national importance. Third, the Sixth Circuit's approach is at odds with this Court's precedent.

I. THE CIRCUITS ARE SPLIT OVER THE ELEMENTS OF AN INFORMATIONAL PRIVACY CLAIM.

In keeping with this Court's precedents, all courts of appeals agree that Fourteenth Amendment substantive due process protection extends to two types of privacy interests. The first is "independence in making certain kinds of impor-

tant decisions"; the second is the informational privacy interest at issue in this case, the "interest in avoiding disclosure of personal matters." *E.g.*, App. 13 (citing *Whalen v. Roe*, 429 U.S. 589, 599, 603–04 (1977)); *Tucson Women's Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004); *Alexander v. Peffer*, 993 F.3d 1348 (8th Cir. 2002); *Denius v. Dunlap*, 209 F.3d 944 (7th Cir. 2000); *Sheets v. Salt Lake City*, 45 F.3d 1383 (10th Cir. 1995); *Doe v. City of New York*, 15 F.3d 264 (2d Cir. 1994); *James v. City of Douglas*, 941 F.3d 1539 (11th Cir. 1991); *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990); *Fraternal Order of Police v. City of Philadelphia*, 821 F.2d 105 (3d Cir. 1987).

The circuits are hopelessly split, however, on the scope of the latter category, the informational privacy interest. Eight circuits recognize that a plaintiff can claim a federal right to privacy concerning personal information without any further showing that the information implicates a fundamental liberty interest. *See infra* Point I.A. The Sixth Circuit defies the weight of authority by engrafting such a threshold requirement. *See infra* Point I.B. The split is acknowledged, entrenched, and intractable. Only this Court can resolve the split.

A. Eight Circuits Recognize a Right to Privacy with Regard to Personal Information Without a Threshold Showing of an Underlying Fundamental Liberty Interest.

Eight circuits—the Second, Third, Fourth,

Seventh, Eighth, Ninth, Tenth, and Eleventh—recognize that a plaintiff can claim a federal right to privacy concerning personal information without any further showing that the information implicates a fundamental liberty interest. *See Tucson Woman's Clinic*, 379 F.3d at 551; *Alexander*, 993 F.3d at 1350; *Denius*, 209 F.3d at 957; *Sheets*, 45 F.3d at 1388; *Doe*, 15 F.3d at 267; *James*, 941 F.3d at 1544; *Walls*, 895 F.2d at 192; *Fraternal Order of Police*, 821 F.2d at 109.

When an individual claims that a governmental entity has violated her right to privacy by disclosing personal matters, these circuits apply the balancing test this Court set forth in *Whalen* and *Nixon*. *See, e.g.*, *Tucson Women's Clinic*, 379 F.3d at 551; *Denius*, 209 F.3d at 956; *Sheets*, 45 F.3d at 1388–89; *James*, 941 F.3d at 1544; *Walls*, 895 F.2d at 192; *Fraternal Order of Police*, 821 F.2d at 112; *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983). As a first step in evaluating whether a claimant has a right to privacy over the confidential information at issue, the circuits examine whether the claimant had a reasonable expectation of privacy in that information. "The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny." *Walls*, 895 F.2d at 192 (citing *Fraternal Order of Police*, 812 F.2d at 112–13).

Many cases in this context concern an individual's right to privacy in his or her medical records. *See, e.g.*, *Tucson Women's Clinic*, 379 F.3d at 551; *Denius*, 209 F.3d at 956–57; *Fraternal*

Order of Police, 821 F.2d at 112–15; *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980). It is widely accepted among the eight circuits recognizing a right to privacy in personal information that an individual has a reasonable expectation of privacy in such medical information. Indeed, even this Court has recognized as much. *Whalen*, 429 U.S. at 599–600. All eight circuits have further recognized that parties have a reasonable expectation of privacy in, and thus a constitutionally protected privacy interest with respect to, personal financial information. *See, e.g.*, *Sheets*, 45 F.3d at 1388 (finding a protected privacy interest in matters concerning "marriage, finances and business"); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (noting the Second Circuit's recognition of the right to confidentiality in "the context of financial disclosure"); *Alexander*, 993 F.2d at 1348 (acknowledging a privacy interest in "highly personal . . . financial information"); *Walls*, 895 F.2d at 194 (same); *Fraternal Order of Police*, 812 F.2d at 115 (same); *Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978) (recognizing a "substantial" privacy interest in personal financial information); *James*, 941 F.2d at 1543 n.7 (noting Fifth Circuit precedent finding a right to privacy in confidential financial information as binding). As the Seventh Circuit has noted, "[b]ecause confidential financial information may implicate substantial privacy concerns and impact other fundamental rights, we agree with the overwhelming majority of our sister circuits that some types of financial infor-

mation involve the degree and kind of confidentiality that is entitled to a measure of protection under the federal constitutional right of privacy." *Denius*, 209 F.3d at 958.

In these circuits, once a court determines that the claimant has a reasonable expectation of privacy in the personal information she seeks to protect, it balances that interest against whether the state has a compelling state interest in making or requesting the disclosure of that information. *See, e.g., James*, 941 F.3d at 1544; *Walls*, 895 F.2d at 192; *Fraternal Order of Police*, 821 F.2d at 112; *Barry*, 712 F.2d at 1559. Most circuits take the extra step of examining whether the state has taken adequate measures to protect the claimant's private information and to ensure that it is not disseminated for any other unrelated purposes. *See Tucson Woman's Clinic*, 379 F.3d at 551; *Walls*, 895 F.2d at 194; *Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir. 1989); *Westinghouse*, 638 F.2d at 579–80 (3d Cir. 1980). Many circuits have adopted a more particularized balancing test that takes into account several factors in determining whether an individual's right to privacy has been violated. Some circuits have broken down the factors as follows:

> 1) the type of record requested; 2) the information it does or might contain; 3) the potential for harm in any subsequent nonconsensual disclosure; 4) the injury from disclosure to the relationship in which the record was generated; 5) the

> adequacy of safeguards to prevent unauthorized disclosure; 6) the degree of need for access; 7) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Denius, 209 F.3d at 956 n.7 (citing *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999)) (internal quotations omitted).

None of these circuits require a party to demonstrate that the claimed right to privacy implicates a fundamental liberty interest. In fact, some of them have explicitly considered, and rejected, such a requirement. *See, e.g.*, *Denius*, 209 F.3d at 957 (expressly rejecting the Sixth Circuit's approach and noting that the majority of circuits agree that *Whalen* and *Nixon* established a federal right of informational privacy); *Barry*, 712 F.2d at 1559 (identifying the Sixth Circuit as one of the only circuits that do not recognize a general right to nondisclosure of personal information against which infringing government actions are balanced).

B. The Sixth Circuit's Opinion Deepens an Existing Split.

The Sixth Circuit's rule stands in stark conflict to this overwhelming authority. In the Sixth Circuit, unlike in these eight circuits, it is not enough for a plaintiff to demonstrate that she had a reasonable expectation of privacy in the information she seeks to protect. The plaintiff must also show that her claimed privacy in-

terest implicates "a right that is either 'fundamental' or 'implicit in the concept of ordered liberty.'" App. 19 (quoting *Bloch v. Ribar*, 156 F.3d 673, 684 (6th Cir. 1988). Consequently, the Sixth Circuit has found that a right to privacy extends only to two narrow classes of personal information: (1) information that, if disclosed, could create a threat to bodily integrity, and (2) information of a sexual and humiliating nature. *See Bloch v. Ribar*, 156 F.3d 673, 673 (6th Cir. 1998); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1055 (6th Cir. 1998).

This focus on the result of disclosure, rather than the private nature of the personal information at stake, means that the Sixth Circuit, unlike its sister circuits, will simply not recognize a right to privacy in any financial information. *See Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 575 (6th Cir. 2000) (declining to find a policy mandating the disclosure of real estate holdings to violate the right to privacy because "[t]he privacy interest one may have in one's personal finances . . . is far afield from [the] intimate concerns" recognized as fundamental privacy interests). Thus, in this case, because Ms. Lambert could not demonstrate that the disclosure of her Social Security number and other personal information implicated a fundamental liberty interest, the court refused to balance the interest in protecting that information against the Clerk of Court's interest in disclosing it in perhaps the most public of forums—the internet.

While no other circuit requires such an onerous showing before proceeding to the balancing test, at least one other circuit seems poised to follow the Sixth Circuit's lead. The First Circuit has analyzed this circuit split in the context of determining whether a governmental official violated "well established" constitutional rights when disclosing certain psychiatric records. *See Borucki v. Ryan*, 827 F.2d 836, 841–42 (1st Cir. 1987). Because of the posture of the case, the First Circuit did not have to resolve definitively whether the right to informational privacy required a showing that a fundamental liberty interest was at stake. But in ruling that there was no "well established" right to privacy in that context, the court drew heavily from the Sixth Circuit's approach to informational privacy cases—suggesting that if given the opportunity, the First Circuit might well follow the Sixth.[2]

* * *

This circuit conflict is entrenched and intractable. As noted above, some circuits that espouse the majority position have considered and rejected the Sixth Circuit's approach. *See supra* at 14. Conversely, since 1981, the Sixth Circuit has acknowledged this Court's balancing test and the majority rule, but declined to follow ei-

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[2] The D.C. Circuit has also noted the conflict but has declined to take a position. *See, e.g., Am. Fed'n of Gov't Employees v. HUD*, 118 F.3d 786, 791–92 (D.C. Cir. 1997).

ther. *See J.P. v. DeSanti*, 653 F.2d 1080, 1088–89 (6th Cir. 1981). The Sixth Circuit has hardened its position in a series of opinions—almost all unanimous. *See Barber v. Overton*, 496 F.3d 449, 456–57 (6th Cir. 2007); *Overstreet*, 305 F.3d at 575; *Bloch*, 156 F.3d at 684; *Kallstrom*, 136 F.3d at 1064. And in denying rehearing en banc, the Sixth Circuit has confirmed that it has no interest in reconsidering its longstanding position. Only this Court's intervention will resolve the conflict.

II. THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE IN LIGHT OF THE NATIONAL SCOURGE OF IDENTITY THEFT.

There are 8.3 million Cynthia Lamberts every year. Federal Trade Commission, *2006 Identity Theft Survey Report* 4 (2007), *available at* http://www.ftc.gove/os/2007/11/SynovateFinalReportIDTheft2006.pdf. Identity thieves inflict about $15.6 billion in financial damage per year, not just on consumers, but on creditors and retail establishments. *Id.* at 9. That does not account for the immense time and effort the victims expend in fending off angry creditors, responding to investigations, and cleaning up besmirched credit ratings. *Id.* at 39–42. Identity theft is one of the fastest growing crimes in the United States. Social Security Administration, *Identity Theft and Your Social Security Number* 2 (2007), *available at* http://www.ssa.gov/pubs/10064.pdf. That stands to reason, for the marks are so easy, the potential payload is so high, the

crime is so risk-free, and the chances of getting caught are so slim. *See* Chris Jay Hoofnagle, *Identity Theft: Making the Known Unknowns Known*, 21 Harv. J.L. & Tech. 97, 107–08 (2007) (estimating that identity thieves have only a one in 700 chance of getting caught).

Because the stakes are so high, and the potential harm so ruinous, consumer organizations, banks, and state and federal governments have made it a priority to alert consumers to the need to safeguard their private financial information. *See e.g.*, Federal Trade Commission, *Deter Detect Defend, Avoid ID Theft* (2006), *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/idtheft/idt01.pdf. A whole new industry has emerged in recent years to protect consumers from identity theft. Federal Trade Commission, *To Buy or Not to Buy: Identity Theft Spawns New Products and Services to Help Minimize Risk* (2007), *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/idtheft/idt05.pdf. These authorities all underscore just how critical it is for consumers to maintain the confidentiality of their Social Security numbers. For an identity thief, a Social Security number represents the keys to the kingdom. Armed with that one piece of information, an identity thief can locate everything he needs to obtain a state ID card or drivers license, open credit card accounts, apply for loans, set up telephone service, and obtain medical and auto insurance. *Preserving the Integrity of Social Security Numbers and Preventing their Misuse by Terrorists and Identity Thieves: Hearing Before the Subcomm. on Social Security of*

the H. Ways and Means Comm., 107th Cong. (2002) (testimony of Grant D. Ashley), *available at* http://www.fbi.gov/congress/congress02/ashley091502.htm. In short, a Social Security number is all a thief needs to completely swipe an identity. *Id.*

All the warnings, all the precautions, and all the sophisticated security systems are for naught, if government officials feel free to post the secret information publicly for all to see. Governmental units have more secret financial information on more citizens than anyone else. A single inept government official has the power to wreak havoc with the finances and security of thousands of consumers.

That is why this case presents an issue of national importance. The premise of liability under § 1983 is that governmental officials like Mr. Hartmann respond to tort incentives. *See Owen v. City of Independence*, 445 U.S. 622, 651–52 (1980) (stating that the specter of § 1983 liability for injurious conduct "should create an incentive for officials . . . to err on the side of protecting citizens' constitutional rights"). They are more likely to respect constitutional rights—and less likely to conclude, as Mr. Hartmann did, that it is not worth the expense or the bother—if they face the prospect of being held accountable.

But, of course, the § 1983 incentives will serve this intended function only to the extent that the courts treat the privacy right at issue as a right of constitutional dimension. The answer to the question presented will affect whether

government officials safeguard the secret information they are entrusted with or, like Mr. Hartmann, expose hundreds of thousands of citizens to the real possibility of financial ruin.

III. THE SIXTH CIRCUIT'S HOLDING IS WRONG.

This Court should also grant certiorari because the rule followed by the Sixth Circuit is wrong.

First, the Sixth Circuit's rule is inconsistent with this Court's jurisprudence. Justice Brandeis described the right to protect one's thoughts, beliefs, and emotions from governmental intrusion as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). In *Whalen v. Roe*, this Court looked to Justice Brandeis' opinion in finding a constitutionally protected "zone of privacy" with respect to the "individual interest in avoiding disclosure of personal matters." 429 U.S. at 598–99 & n.25. Four months later, this Court reaffirmed the right to protect private information in *Nixon v. Administrator of General Services*. 433 U.S. at 457–58. In requiring a threshold showing of an underlying fundamental liberty interest as a prerequisite to pleading a violation of informational privacy, the Sixth Circuit has put itself at odds with this Court's 30-year-old precedent.

In *Whalen*, this Court identified the individ-

ual interest in avoiding disclosure of personal matters. 429 U.S. at 599. In that case, physicians and patients had brought an action challenging the constitutionality of a New York statute requiring disclosure of every prescription of a certain class of drugs. The patients argued that the statute violated their privacy interest in avoiding disclosure of personal matters because, if information regarding their prescriptions became publicly known, it could adversely impact their reputations, and thus make them reluctant to use the drugs. *See id.* at 600. Without any threshold consideration of whether a fundamental liberty interest was implicated, this Court weighed the totality of the circumstances—i.e., the patient's expectation of privacy in the prescription information; the number and nature of the individuals who would have access to the information; the extent to which the information would be protected; and the state's need for disclosure. *See id.* at 600–03. This Court ultimately held that the disclosure was limited to individuals who would typically have access to prescription information, and that adequate safeguards existed to protect the information. *Id.* at 601–02. As a result, it found that the statute did not violate the patients' right to privacy. *Id.* at 603–04.

In *Nixon*, this Court gave form to *Whalen*'s principles, by balancing competing interests to determine the constitutionality of legislation requiring President Nixon to disclose his presidential records to the Administrator of General Services for safekeeping. Once again, this Court

recognized the right to privacy in "avoiding disclosure of personal matters." 433 U.S. at 457 (quoting *Whalen*, 429 U.S. at 599). Its analysis did not require a threshold consideration of whether a fundamental liberty interest was implicated. *Id.* Instead, this Court's balancing test examined: (1) whether the "pattern of de facto Presidential control and congressional acquiescence gave rise to [President Nixon's] legitimate expectation of privacy in" his presidential records; (2) the nature and quantity of the personal, private information present in the files; (3) the important public interest in preserving access to his Presidential files; and (4) the limited number of individuals who would have access to the files. *Id.* at 457–65. This Court ultimately upheld the law. *Id.* at 465.

The Sixth Circuit was simply wrong when it opined that "*Whalen* and *Nixon* . . . extend the right to informational privacy only to interests that implicate a fundamental liberty interest." App. 14 (internal quotations omitted); *see DeSanti*, 653 F.2d at 1090 (articulating same point). The Sixth Circuit derived the notion from dicta from an opinion decided a year before *Whalen* and *Nixon*—*Paul v. Davis*, 424 U.S. 693 (1977)—in which this Court considered whether individuals had a constitutionally protected right that would prevent a state from "publiciz[ing] the record of an official act such as an arrest." *Id.* at 713. This Court, in dicta, stated that the right to "personal privacy must be limited to those [rights] which are 'fundamental' or 'implicit in the concept of ordered liberty.'" *Id.*

However, when confronted with the same issues a year later in *Whalen* and *Nixon*, this Court made no mention of any threshold requirement of showing an underlying "fundamental liberty interest." Indeed, this standard has never appeared anywhere else in this Court's jurisprudence.

Second, the Sixth Circuit's rule incorrectly focuses on the *effect* of the disclosure rather than on the private nature of the information being disclosed. In keeping with Supreme Court precedent, the majority approach focuses on the information itself, and asks whether a reasonable person would expect the information to be kept private. The answer to that question should depend, as it does in most circuits, upon the nature of the information disclosed. It should not depend, as it does in the Sixth Circuit, upon the nature of the harm inflicted. If information is private, it should be kept private, and the right to keep it private should not depend upon whether the harm from its dissemination is classified as reputational or bodily harm, on the one hand, or, financial harm, on the other hand.

Third, the Sixth Circuit's misplaced focus on the nature of the harm is confusing and unworkable. There is no better illustration of the confusion than the unpredictable and inconsistent rulings that have come out of the Sixth Circuit, even in the narrow circumstances where it recognizes a right to informational privacy. For example, the Sixth Circuit has reached

irreconcilable conclusions over when release of the same information could lead to bodily harm. In the Sixth Circuit, the disclosure of police officers' addresses and family information to defense attorneys of gang members "encroached upon [the officers'] fundamental rights to privacy," *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1069–70 (6th Cir. 1998), but the disclosure of corrections officers' social security numbers and dates of birth (which prisoners' used to locate the corrections officers home addresses and family information), did not implicate a fundamental right to privacy *Barber v. Overton*, 496 F.3d 449, 456–57 (6th Cir. 2007)).

The Sixth Circuit's rule has led to a similar conflict over when the information of a sexual and humiliating nature is actionable. On the one hand, the release by a county sheriff of a rape victim's identity, and the embarrassing details of her rape, implicates the fundamental right to privacy. *Bloch v. Ribar*, 156 F.3d 673, 685–86 (6th Cir. 1998)). On the other hand, the release of juveniles' social histories, including the details of their sexual and physical abuse, does not. *See J.P. v. DeSanti*, 653 F.2d 1080, 1088 (6th Cir. 1981). These inconsistencies are not attributable to a nuanced parsing of facts. They are the product of the fundamental incoherence of the Sixth Circuit's legal standard.

This Court should intervene to announce a coherent rule that is more consistent with its prior precedents.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CYNTHIA LAMBERT,
Plaintiff-Appellant,

v.

GREG HARTMAN, in his official capacity as Clerk of Courts, and HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS,
Defendants-Appellees.

No. 07-3154

OPINION

Appeal from the United States District Court
for the Southern District of Ohio
No. 04-00837—Michael H. Watson, J., Presiding

Argued: January 30, 2008

Decided and Filed: February 25, 2008

Before GUY, GILMAN, and McKEAGUE,
Circuit Judges.

COUNSEL

ARGUED: Marc D. Mezibov, LAW OFFICES OF MARC MEZIBOV, Cincinnati, Ohio, for Appellant. Pamela J. Sears, HAMILTON COUNTY PROSECUTOR'S OFFICE, Cincinnati, Ohio, for Appellees.

ON BRIEF: Marc D. Mezibov, Christian A. Jenkins, Stacy Ann Hinners, LAW OFFICES OF MARC MEZIBOV, Cincinnati, Ohio, for Appellant. Pamela J. Sears, Michael G. Florez, HAMILTON COUNTY PROSECUTOR'S OFFICE, Cincinnati, Ohio, for Appellees.

OPINION

RONALD LEE GILMAN, Circuit Judge.

Cynthia Lambert appeals the district court's dismissal of her complaint against Greg Hartmann in his official capacity as the Hamilton County Clerk of Courts (the "Clerk") and against the Hamilton County Board of County Commissioners (the "County") (collectively the "Defendants"). In September of 2003, Lambert received a traffic citation for speeding. She later discovered that this citation, which contained personal identifying information (including her Social Security number), had been published on the Clerk's public website.

Lambert sued the Defendants pursuant to 42 U.S.C. § 1983, claiming that the publication of the

citation violated her constitutional right to privacy under the Fourteenth Amendment to the U.S. Constitution. She further asserted that her identity had been stolen by a third party as a direct result of the Clerk's publication of the citation, and that she had consequently suffered economic damages, damage to her personal credit rating, and damage to her reputation. Lambert also raised state-law claims and sought to certify her complaint as a class action.

The Defendants moved to dismiss Lambert's complaint on the basis that she had failed to state a claim under § 1983. Concluding that Lambert's § 1983 claim must fail because her alleged privacy interest was not of a constitutional dimension, the district court granted the Defendants' motion. The court then dismissed her pendent state-law claims without prejudice. Lambert argues that the court erred in dismissing her complaint and renews her claim that the Defendants violated her constitutional right to privacy. For the reasons set forth below, we AFFIRM the judgment of the district court.

I. BACKGROUND

A. Factual background

In September of 2003, Lambert received a traffic citation for speeding in Hamilton County, Ohio. The issuing officer completed an Ohio Uniform Traffic Ticket, a form used throughout Ohio that includes a person's name, signature, home address, birth date, driver's license number, and Social Security number. One copy of the citation was given to Lambert and another was filed with the Clerk's Office. Approximately a year after she received the citation, Lam-

bert was contacted by two retail stores about suspicious purchases that had been made in her name. The individual who made the purchases presented a driver's license that displayed Lambert's full name, home address, birth date, driver's license number, and Social Security number.

During her conversations with the retailers, Lambert was informed that the identity thief might have gained access to her personal information through the Clerk's website. Lambert then looked on the internet and discovered that the Clerk's publicly accessible site made it possible to search and locate traffic citations that retained all of an individual's identifying information, including his or her Social Security number. When Lambert examined her citation on the website, she realized that, like the fake identification used by the identity thief, the citation contained a driver's license number that was incorrect by one digit. Lambert promptly called the Clerk's Office to complain about the publication of her personal information. The Clerk's Office refused to remove the information, explaining to Lambert that the records were made public for the convenience of the parties and that to remove the records "would require vast amounts of manpower."

Lambert filed suit against the Defendants in December of 2004. By that time, law enforcement officials had apprehended a group of individuals who had gained access to the personal information of numerous people found on the Clerk's website and had used that information to commit identity theft. The police informed Lambert that they had arrested a person who was a part of that ring, a woman who later admitted that she was the thief who stole Lam-

bert's identity from the Clerk's website. That woman was later charged with a conspiracy to commit identity theft, convicted, and sentenced to 139 months' imprisonment for her actions.

B. Procedural background

Lambert's claim under 42 U.S.C. § 1983 alleged that the Clerk's policy and practice of publishing personal information on a public website violated her Fourteenth Amendment right to privacy, in addition to her Fourth Amendment right to be free from unreasonable searches and seizures, and her Fourteenth Amendment rights to substantive and procedural due process. She contended that, as a result of the Clerk's policy, she had suffered "economic damages, damages to her personal credit rating, and damage to her reputation." Lambert also raised claims under the common law of Ohio for violation of her right to privacy and the tort of publication of private facts. Finally, she requested the certification of a class action under Rule 23 of the Federal Rules of Civil Procedure on behalf of a putative class of "hundreds of thousands" of people whose Social Security numbers had been published on the Clerk's website.

Lambert originally sought declaratory relief, compensatory damages, and an injunction to prevent the publication of the personal information in question. She later sought leave to amend her complaint, removing her demand for compensatory damages and substituting instead a request for "uniform, class-wide relief in the form of a credit monitoring fund or other prophylactic measure to detect or prevent potential identity theft."

The Defendants moved to dismiss Lambert's complaint, arguing, among other things, that she had failed to state a claim upon which relief could be granted. In December of 2006, the district court entered an order granting the Defendants' motion and dismissing all of Lambert's claims. The court reviewed Sixth Circuit precedent addressing the constitutional right to privacy of personal information and concluded that Lambert's claim was without merit because the privacy interest she asserted did "not implicate either a fundamental right or one implicit in the concept of ordered liberty." Noting that Lambert identified only a "risk of financial harm," the court determined that this injury "bears no equivalence to the potential and actual harm" suffered by the plaintiffs in cases where the Sixth Circuit has recognized a Fourteenth Amendment right to privacy against the disclosure of personal information. The district court therefore agreed with the Defendants that Lambert's claim failed to state a claim under 42 U.S.C. § 1983, concluded that a ruling on her proposed amended complaint was unnecessary, and declined to exercise supplemental jurisdiction over her state-law claims. This timely appeal followed.

II. ANALYSIS

A. Standing

The Defendants assert that because Lambert is no longer seeking compensatory damages and "limits her remedy to credit monitoring relief," she does not have standing to bring her claim. Their contention on this point is somewhat confusing, interchangeably arguing that Lambert's injury is not fairly traceable

to the publication of her Social Security number and that "the injury of identity theft in the future is too speculative and conjectural to entitle her to [credit-monitoring] relief." Lambert has failed to address the Defendants' challenge, but we nevertheless conclude that she has standing to bring her claim.

To bring a claim in federal court, a plaintiff "must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). This burden can be met by Lambert showing that "(1) [she] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2)[her] injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that [her] injury will be redressed by a favorable decision." *See Daubenmire v. City of Columbus*, 507 F.3d 383, 388 (6th Cir. 2007) (internal quotation marks omitted).

Lambert has alleged that her identity was stolen and that her financial security and credit rating suffered as a result. She also claims that because of the nature of identity theft, she has been exposed to the risk that people have accessed her personal information on the internet and will be able to use that information to commit future acts of identity theft against her. Although this latter injury is somewhat "hypothetical" and "conjectural," her actual financial injuries are sufficient to meet the injury-in-fact requirement. *See Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby, Mich.*, 470 F.3d 286, 294 (6th Cir. 2006) (noting that "[t]his Court has ex-

plicitly held that" certain types of economic injuries are sufficient to confer standing).

Indeed, the Defendants do not dispute that Lambert has been injured. They instead attack her standing on the basis that her injuries are not fairly traceable to the Clerk's website. Specifically, they argue that the harm suffered by Lambert was caused by an intervening act-the criminal act of a third party. They therefore claim that Lambert has not met the second prong of the standing test because she is unable to demonstrate that her injuries are fairly traceable to the Defendants.

The Defendants are correct in pointing out that a third party was undoubtedly the direct cause of Lambert's injuries. But because both the traffic citation and the fake identification used to make purchases in Lambert's name contained the identical, incorrect driver's license number, Lambert was able to link the act of identity theft to the personal information that was made available by the Clerk. Moreover, the identity thief (who was indicted and convicted before the district court dismissed Lambert's case) acknowledged that she had taken Lambert's personal information from the Clerk's website. Lambert thus alleged sufficient facts to show that her injuries were fairly traceable to the publication of her personal information by the Clerk. *See Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 261 (1977) (explaining that the cause of the plaintiff's asserted injury may be indirect so long as the complaint indicates "that the injury is indeed fairly traceable to the defendant's acts or omissions").

The Defendants also challenge the relief sought by Lambert. They argue that the credit-monitoring fund requested by Lambert would remedy neither her past injury of "publication" nor her potential injury of "future identity theft." The Defendants cite a number of cases that, according to their interpretation, support the contention that Lambert does not have standing. But only one of these cases even addresses standing, and in that case the Sixth Circuit concluded that the plaintiff had pled facts sufficient to confer standing. *See Sutton v. St. Jude Medical S.C., Inc.*, 419 F.3d 568, 575 (6th Cir. 2005) (concluding that the plaintiff had standing to seek medical testing and monitoring allegedly made necessary by the increased risk of future harm created by a heart-valve implant).

Indeed, the Defendants mischaracterize both the injury that Lambert has alleged and the nature of the relief that she seeks. Lambert claims that the past identity theft has damaged her credit rating and that the publication of her personal information has exposed her to a risk of future identity theft. This court's decision in *Sutton* undermines, rather than supports, the Defendants' contention that a monitoring fund would not redress these injuries. We explained in *Sutton* that if the plaintiff could prove that the implanted heart valve had increased the future risk to his health, "medical monitoring [would] undoubtedly help to remedy the situation." *Id.* Likewise, if Lambert were able to prove that she continues to face an increased risk of identity theft, she could likely show that monitoring suspicious activity on her credit report would not only combat that future risk, but would also help to redress the

past financial injury that she has suffered. For these reasons, we conclude that Lambert has standing to bring her claims.

B. Immunity claims

The Defendants also raise a number of immunity defenses as an alternative ground for rejecting Lambert's claims. Although Lambert acknowledges that her opponents raised these claims before the district court and on appeal, she declined to address them in either of her briefs or during oral argument. The district court likewise declined to consider any of these arguments, resting its dismissal of Lambert's claims on the merits. Because we agree with the district court's disposition of this case on the merits, we similarly see no need to address the Defendants' immunity arguments. *See, e.g., Nair v. Oakland County Cmty. Mental Health Auth.*, 443 F.3d 469, 477 (6th Cir. 2006) (explaining that where, as here, a defendant declines to raise Eleventh Amendment immunity as a threshold defense, "federal courts have discretion to address the sovereign-immunity defense and the merits in whichever order they prefer").

C. Lambert's § 1983 claim

1. Standard of review

We review de novo the district court's decision to grant a defendant's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Dubay v. Wells*, 506 F.3d 422, 427 (6th Cir. 2007). "A motion to dismiss for failure to state a claim is a test of the plaintiff's cause of action as stated in the complaint, not a challenge to the plaintiff's factual alle-

gations." *Golden v. City of Columbus*, 404 F.3d 950, 958-59 (6th Cir. 2005). We must therefore construe the complaint in a light most favorable to Lambert and accept all of her factual allegations as true. *See Dubay*, 506 F.3d at 427. Although the factual allegations in a complaint need not be detailed, they "must do more than create speculation or suspicion of a legally cognizable cause of action; they must show *entitlement* to relief." *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (emphasis in original) (citing *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007)).

2. Municipal liability under 42 U.S.C. § 1983

A prima facie case under § 1983 has two elements: "(1) the defendant must be acting under the color of state law, and (2) the offending conduct must deprive the plaintiff of rights secured by federal law." *Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998) (citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981)). To succeed on a § 1983 claim against a local government, the plaintiff must also prove that the injury about which she complains was caused by an unconstitutional government policy or custom. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978) ("[I]t is when execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983.").

There is no question, of course, that the Defendants acted under color of state law in making Lambert's traffic citation available on the internet. But the Defendants maintain that they cannot be held liable for Lambert's injuries because they were caused by a third party, the identity thief. Although

they do not frame it as such, this position is in essence an attack on Lambert's ability to show that the violation she alleges was "committed by a person acting under color of state law." *See Harbin-Bey v. Rutter*, 420 F.3d 571, 575, 577 (6th Cir. 2005) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)) (holding that a prison's classification of an inmate as a security threat due to his gang affiliation did not constitute an equal protection violation). We have determined, however, that a § 1983 plaintiff can "circumvent the state action requirement if he demonstrated that the state created a special danger" in releasing private information that leads to harm. *Barber v. Overton*, 496 F.3d 449, 453-54 (6th Cir. 2007) (explaining that a plaintiff could meet the state-action requirement by demonstrating that the state's disclosure put the plaintiff at risk, but declining to reach that question because the prison guards challenging the release of their personal information by prison officials to prisoners had not demonstrated a constitutional violation of their rights to privacy); *see also Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998) (holding that police officers' privacy interest in their personnel files were of a constitutional dimension where the city "created a very real threat to the officers' and their family members' personal security and bodily integrity, and possibly their lives").

Moreover, Lambert sued the Clerk in his official capacity, which is the equivalent of suing the Clerk's employer, the County. *See Alkire v. Irving*, 330 F.3d 802, 810 (6th Cir. 2003) ("While '[p]ersonal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law,' individuals sued in their official capacities

stand in the shoes of the entity they represent."(alteration in original) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165 (1985))). The only issue in the present case, then, is whether the Clerk's actions, as alleged in Lambert's complaint, were part of a policy or custom that violated Lambert's constitutional right to privacy.

3. The scope of the constitutional right to privacy

Two types of interests have been identified by the Supreme Court as protected by the right to privacy that is rooted in the substantive due process protections of the Fourteenth Amendment. One is the interest in "independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600 & n. 26 (1977) (noting that these decisions have been characterized as dealing with "matters relating to procreation, marriage, contraception, family relationships, and child rearing and education" (quoting *Paul v. Davis*, 424 U.S. 693, 713 (1976))). The other type of privacy interest applicable to individuals is the "interest in avoiding disclosure of personal matters." *Id.* at 599, 603-04 (recognizing that a statute requiring that the state be provided with a copy of certain drug prescriptions implicated the individual's interest in nondisclosure, but upholding the law because the statute contained adequate security measures); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 465 (1977) (assuming that President Nixon had a legitimate expectation of privacy in his private communications, but upholding a federal law that provided for the review and classification of presidential materials by professional archivists). Lambert's claim implicates the latter in-

terest, which this court has described as "an individual's right to control the nature and extent of information released about that individual" and that "has been coined an informational right to privacy." *Bloch v. Ribar*, 156 F.3d 673, 683 (6th Cir. 1998).

This court, in contrast to some of our sister circuits, "has narrowly construed the holdings of *Whalen* and *Nixon* to extend the right to informational privacy only to interests that implicate a fundamental liberty interest." *Id.* at 684. A plaintiff alleging a violation of her right to informational privacy must therefore demonstrate that "the interest at stake relates to 'those personal rights that can be deemed fundamental or implicit in the concept of ordered liberty.' " *Id.* (quoting *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981)). Only after a fundamental right is identified should the court proceed to the next step of the analysis—the balancing of the government's interest in disseminating the information against the individual's interest in keeping the information private. *See Kallstrom*, 136 F.3d at 1061 ("This circuit . . . will only balance an individual's interest in nondisclosure . . . against the public's interest in and need for the invasion of privacy where the individual privacy interest is of constitutional dimension.").

Applying these standards, this court has recognized an informational-privacy interest of constitutional dimension in only two instances: (1) where the release of personal information could lead to bodily harm (*Kallstrom*), and (2) where the information released was of a sexual, personal, and humiliating nature (*Bloch*). In *Kallstrom*, the plaintiffs were undercover police officers who had been actively in-

volved in a drug-conspiracy investigation of a violent gang and who had subsequently testified at trial against a number of the gang's members. 136 F.3d at 1059. During the trial, the city—despite having promised to keep the officers' personnel records confidential—released the officers' records to defense counsel. The records contained, among other personal information, the names and addresses of the officers, their immediate family members, and their personal references. *Id.*

This court in *Kallstrom* concluded that the officers' privacy interests were of constitutional dimension because they implicated a fundamental interest "in preserving their lives and the lives of . . . their family members, as well as preserving their personal security and bodily integrity." *Id.* at 1062. That conclusion was supported by a long line of cases, dating back to the nineteenth century, in which courts have held that individuals have a constitutional right to avoid the kind of physical invasions or abuse that "strip[ ] the very essence of personhood." *Id.* at 1063 (internal quotation marks omitted). The *Kallstrom* court's holding therefore rested on the finding that the city's disclosure had created a risk that the officers' personal information might "fall into the hands of persons likely to seek revenge upon the officers" and had created a "very real threat" to the officers' and their family members' bodily integrity and possibly even their lives. *Id.*

In *Bloch*, this court considered whether the constitutional right to informational privacy was triggered by a press conference in which the sheriff released the "highly personal and extremely humiliating details" of the rape to which Bloch had been sub-

jected, some of which were "so embarrassing she had not even told her husband." *Bloch*, 156 F.3d at 676. The court concluded that Bloch could invoke her Fourteenth Amendment right to privacy because "sexuality and choices about sex, in turn, are interests of an intimate nature which define significant portions of our personhood." *Id.* at 685.

As in *Kallstrom*, this court's holding in *Bloch* was premised on the notion that the disclosure of private sexual information implicated a "fundamental right or one implicit in the concept of ordered liberty"—namely the fundamental right of privacy in one's sexual life. *Id.* at 684, 686. The clear principle emerging from *Bloch* is that the sheriff's publication of the details of Bloch's rape implicated her right to be free from governmental intrusion into matters touching on sexuality and family life, and that to permit such an intrusion would be to strip away the very essence of her personhood. *See id.* at 685 (citing *Thorne v. City of El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983), for the proposition that an individual's privacy right in her sexual activities "follow[ed] from the cases holding that such basis matters as contraception, abortion, marriage, and family life are protected by the constitution from unwarranted government intrusion").

4. Lambert's claim of a constitutional deprivation

In the face of the Sixth Circuit's restrictive view of informational privacy, Lambert makes two principal arguments to support her assertion that the district court erred in dismissing her complaint. She first claims that the district court's analysis was

flawed because "[t]he proper framework should be whether the claimant has a 'reasonable expectation of privacy' in the information he or she wants to keep private, and, if so, whether the government has any legitimate interest in disclosing such information to weigh against the individual interest in disclosure." Second, she contends that the court erred in concluding that the Clerk's publication of her traffic citation on the internet did not implicate a fundamental right.

a. Request for a new standard

Lambert's first argument is a request for us to adopt a new approach to assessing informational privacy claims—one that does not require the court to first determine whether the privacy interest implicates a fundamental right. The reasonable-expectation-of-privacy standard that Lambert proposes is in many ways similar to the more fluid approach that other circuits have adopted for assessing claims of informational privacy. *See Kallstrom*, 136 F.3d at 1061 n.1 (citing cases in support of the proposition that "[o]ther circuits have interpreted *Whalen* and *Nixon* as creating a broad constitutional right to informational privacy to be balanced against the public's interest and need for the invasion of privacy"); *cf.* Helen L. Gilbert, Comment, *Minors' Constitutional Right to Informational Privacy*, 74 U. Chi. L. Rev. 1375, 1382 (2007) (contrasting the Sixth Circuit's approach to informational privacy with other circuits that do not require the implication of a fundamental liberty interest, and instead "decide if the party alleging an invasion of privacy has a legitimate expectation of privacy in the information in question").

Employing this standard, Lambert argues that she has a reasonable expectation of privacy in her Social Security number, and that the district court therefore erred in failing to balance that interest against the Defendants' interest in publishing unredacted public records on the internet. Lambert is of course correct in pointing out that both Congress and the courts have recognized the privacy interest in one's Social Security number. *See, e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a (providing restrictions on the disclosure of Social Security numbers); *Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 365 (5th Cir. 2001) (noting, in the context of a Freedom of Information Act request, that "an individual's informational privacy interest in his or her SSN [Social Security number] is substantial"); *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999) (recognizing that "the indiscriminate public disclosure" of Social Security numbers might implicate the constitutional right to privacy, but concluding that any interest in nondisclosure was outweighed by the government's interest in making bankruptcy documents available to the general public).

The Sixth Circuit, however, has developed and applied a different approach to assessing informational privacy claims. As discussed above, that approach requires that the asserted privacy interest implicate a fundamental right. *See Bloch*, 156 F.3d at 684; *DeSanti*, 653 F.2d at 1090 (holding that the disclosure of juveniles' records to juvenile court personnel did not implicate the plaintiffs' fundamental rights); *Kallstrom*, 136 F.3d at 1061-62 (explaining that the *DeSanti* court "rejected the notion of a general constitutional right of nondisclosure of personal

information against which the governmental action must be weighed"). We are bound by those decisions unless this court sitting en banc or the Supreme Court holds otherwise, and Lambert's argument must fail for that reason. *See Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) (explaining that the decision of a prior panel "remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision").

b. Existence of a fundamental right

The district court recognized that this court's precedents require a showing of a privacy interest that implicates a right that is either "fundamental" or "implicit in the concept of ordered liberty." *See Bloch*, 156 F.3d at 684. After reviewing *Kallstrom* and *Bloch*, it concluded that Lambert could not meet this standard because she had "only identified a risk of financial harm." This harm, the court noted, "bears no equivalence to the potential and actual harm suffered by the *Kallstrom* and *Bloch* plaintiffs, respectively." The court therefore refused to balance Lambert's privacy interest against the Defendants' interest in making public records available on the internet. Lambert disputes the district court's conclusion that her harm does not meet the first prong of the test for informational-privacy claims, arguing that the Defendants' invasion of her privacy implicates her fundamental rights.

There are two ways for Lambert to demonstrate that a fundamental right underlies her privacy claim. The first would be to link her interest in non-

disclosure to an already established fundamental right. Indeed, this is how the plaintiffs in *Kallstrom* and *Bloch* succeeded. *See Bloch*, 156 F.3d at 685 (acknowledging the well-recognized right to privacy in intimate matters); *Kallstrom*, 136 F.3d at 1062-63 (describing the long history of the right to bodily integrity). Lambert attempts to make this showing by claiming that, like the police officers in *Kallstrom*, her fundamental liberty interest in personal security was compromised by the Clerk's actions.

Alternatively, Lambert could attempt to identify a new fundamental right that was implicated by the public disclosure of her Social Security number. Because the very notion of a fundamental right is rooted in substantive due process, such rights must be based on a protectible interest in life, liberty, or property. *See Does v. Munoz*, 507 F.3d 961, 965 (6th Cir.2007) (explaining that some deprivations of life, liberty or property are subject to substantive limitations that provide "heightened protection against government interference with certain fundamental rights" (citations and internal quotation marks omitted)). But this court has recognized that "identifying a new fundamental right subject to the protections of substantive due process is often an uphill battle, as the list of fundamental rights is short." *Id.* (internal quotation marks omitted). Any fundamental right, moreover, must be either "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." *Id.* (internal quotation marks omitted).

Lambert asserts that the privacy invasion she has alleged is related to (1) her right to personal security, (2) her right to her reputation and good

name, and (3) her right to property. She describes the first two as fundamental liberty interests, and the third as a fundamental property interest.

i. Liberty interests

Lambert asserts that the disclosure of her Social Security number implicates two liberty interests. First, she characterizes the theft of her identity as an interference with the right to personal security recognized in *Kallstrom*. She then describes the damage to her credit rating as an injury to her reputation, which she claims this court has recognized as a fundamental liberty interest.

Lambert's attempt to characterize the Clerk's action as an interference with her right to personal security as discussed in *Kallstrom* is unpersuasive. The *Kallstrom* court unambiguously identified the right involved in that case as one of personal security and bodily integrity, making clear that the fundamental right at issue was a protection against physical invasions. Indeed, the court in *Kallstrom* noted that not even all risks of physical harm created by disclosure would trigger the right to privacy under the Fourteenth Amendment. Rather, the officers in that case could invoke constitutional protection only because they were placed "at substantial risk of serious bodily harm, possibly even death, from a perceived likely threat." *Kallstrom*, 136 F.3d at 1064.

Lambert does not argue that the Clerk's actions put her at any risk of physical harm. And although she is undoubtedly correct that identity theft constitutes a serious personal invasion, it simply does not implicate the well-established right to personal secu-

rity as contemplated by this court in Kallstrom. *Cf. Barber v. Overton*, 496 F.3d 449, 456 (6th Cir. 2007) (declining to recognize a privacy interest of a constitutional dimension where prison officials inadvertently released the Social Security numbers of prison guards to inmates, and concluding that "the release of the social security numbers was not sensitive enough nor the threat of retaliation apparent enough to warrant constitutional protection here").

Lambert next claims that the harm to her "creditworthiness" constitutes a reputational injury that implicates a fundamental liberty interest. Despite the obvious reputational interests at play in *Bloch*, Lambert makes no attempt to analogize her harm to that of the injury suffered by the rape victim in that case. She instead relies on this court's decision in *Chilingirian v. Boris*, 882 F.2d 200 (6th Cir.1989), for the proposition that "a person's reputation, good name, honor, and integrity are among the liberty interests" protected by the Fourteenth Amendment. *Id.* at 205 (citing *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972)).

Even accepting the questionable assertion that one's credit rating is the type of reputational interest protected by the Due Process Clause of the Fourteenth Amendment, the fact that this court has recognized a liberty interest in one's reputation does not necessarily mean that such an interest is either "fundamental" or "inherent in the concept of ordered liberty." *Cf. Does*, 507 F.3d at 965 (explaining that substantive due process protects only "certain fundamental rights and liberty interests," and noting that the "list of fundamental rights is short" (internal quotation marks omitted)). Moreover, the plain-

tiff in *Chilingirian* brought a procedural due process claim, and this court concluded that an informal "name-clearing hearing" provided sufficient protection of the plaintiff's liberty interest in his reputation. *Chilingirian*, 882 F.2d at 205-06. But the very fact that an informal hearing was sufficient to protect Chilingirian's liberty interest in his reputation negates Lambert's claim that the interest involved was fundamental. *See Does*, 507 F.3d at 964 (noting that certain deprivations of liberty fundamental enough to violate a person's right to substantive due process "are subject to limitations regardless of the adequacy of the procedures employed" (emphasis added) (internal quotation marks omitted)).

Lambert has provided no support for the proposition that the harm to her credit implicates a liberty interest that any court has recognized as fundamental, and her argument to the contrary is simply unpersuasive. Furthermore, she does not even begin to meet the hurdle required for the recognition of a new fundamental right. The protection of a person's credit is a concept relating to one's finances and economic well-being, one that by its very nature bears no relationship to the kinds of interests that are "implicit in the concept of ordered liberty." *See Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 575 (6th Cir. 2002) (affirming the denial of a preliminary injunction to a county employee who challenged a policy mandating public disclosure of real estate holdings because "[t]he privacy interest one may have in one's personal finances and real estate holdings is far afield from [the] intimate concerns" recognized as fundamental privacy interests); *cf. Cutshall v. Sundquist*, 193 F.3d 466, 481 (6th Cir.

1999) (rejecting a challenge to a state sex-offender registry on constitutional privacy grounds because the law did "not impose any restrictions on [the plaintiff's] personal rights that are fundamental or implicit in the concept of ordered liberty, such as his procreative or marital rights"). We therefore agree with the district court that Lambert's injuries are more properly described as financial in nature and not truly liberty interests at all.

ii. Property interest

Although this court has never acknowledged a constitutional right to privacy based on the infringement of a property interest, Lambert urges us to recognize such a right in this case. She contends that the Clerk's disclosure of her Social Security number implicated her "fundamental right to property," and that we should proceed to balance her privacy interest against the government's purpose in publishing records on the internet. The Defendants, in contrast, contend that *Kallstrom* and *Bloch* make clear that this court will recognize a privacy interest of constitutional magnitude only if a fundamental liberty interest is implicated.

Even if we were prepared to recognize a constitutional privacy interest based on a property right, Lambert's claim would fail because she has not demonstrated that she had a constitutionally protectible property interest in her personal information. *See Silver v. Franklin Twp. Bd. Of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992) ("To establish a violation of substantive due process, a plaintiff must first establish the existence of a constitutionally-protected property . . . interest."). Lambert never ar-

ticulates precisely what property deprivation the Defendants' exacted upon her, although we presume that she is referring to the various financial injuries she suffered. The Defendants, however, are correct to point out that this court's precedents are not amenable to the recognition of a constitutional right to privacy based on the infringement of a property interest. *See, e.g.*, *Overstreet*, 305 F.3d at 575 (declining to recognize a privacy interest of constitutional dimension "in one's personal finances and real estate holdings"); *Bloch*, 156 F.3d at 684 (noting that this court has "extend[ed] the right to informational privacy only to interests that implicate a fundamental liberty interest" (emphasis added)).

Lambert has undoubtedly shown that, as a policy matter, the Clerk's decision to provide unfettered internet access to people's Social Security numbers was unwise. This much is evidenced by the fact that the Defendants have subsequently removed the citations in question from the website and changed the local rules to better protect sensitive personal information. But to constitutionalize a harm of the type Lambert has suffered would be to open a Pandora's box of claims under 42 U.S.C. § 1983, a step that we are unwilling to take. *See Paul v. Davis*, 424 U.S. 693, 699 (1976) (rejecting a § 1983 claim against police officials who included the plaintiff's name and mug shot on a flyer warning local merchants about possible shoplifters, and explaining that the plaintiff's legal argument "would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment"). Indeed, absent a showing of an

infringement of a right that is "fundamental or implicit in the concept of ordered liberty," this court's precedents bar an action under 42 U.S.C. § 1983 from proceeding any further. Lambert has simply failed to make such a showing.

III. CONCLUSION

For all of the reasons set forth above, we AFFIRM the judgment of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

CYNTHIA LAMBERT, *Plaintiff*, v. GREG HARTMANN, in his official capacity as Clerk of Courts, and HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS, *Defendants*.	Dec. 29, 2006 No. 1:04CV837. **ORDER**

Anita P. Berding, Christian A. Jenkins, Marc David Mezibov, Mezibov & Jenkins LLP, Cincinnati, OH, for Plaintiff.

Michael Gerard Florez, Assistant Prosecutor, Hamilton County Ohio, Pamela J. Sears, Hamilton County Prosecutor, Cincinnati, OH, for Defendants.

WATSON, J.

This matter is before the Court upon Defendants Greg Hartmann and Hamilton County Board of County Commissioners' Motion to Dismiss. (Doc. 35) Plaintiff has filed a Memorandum in Opposition (Doc. 43) and a Notice of Supplemental Authority (Doc. 53). Defendant filed a Reply (Doc. 49), and the Court permitted Plaintiff to file a Surreply (Doc. 49).

Also pending before the Court are Plaintiff's Motion for Leave to File Amended Complaint, Defendants' Memorandum in Opposition (Doc. 37), Plaintiff's Reply (Doc. 43), Defendants' Reply (Doc. 47), Plaintiff's Motion for Leave to Amend Complaint (Doc. 64), and Defendants' Reply (Doc. 65).

A. FACTS

The following factual background is based upon the allegations in Plaintiff's Complaint, Plaintiff alleges that in September of 2003 she was issued a speeding ticket. (Doc. 1, ¶ 7) The officer issuing the ticket used the Ohio Uniform Traffic Ticket, which included Plaintiff's name, signature, home address, birth date, driver's license number, and social security number.(Id.¶¶ 7-8) The ticket was filed with the Hamilton County Clerk's Office. (Id.¶ 9) The ticket was then published on the Clerk's website. (Id.¶ 10)

Approximately a year after Plaintiff received the speeding ticket, Plaintiff received a call from a Sam's Club store regarding a large purchase made by an individual purporting to be Plaintiff. (Id.¶ 11) Using a driver's license with Plaintiff's personal identifying information, the individual was able to purchase over $8,000.00 in electronics. (Id.) The next day, Plaintiff received a call from a Home Depot store regarding a credit card account opened in her name. (Id.¶ 12) An individual using a driver's license with Plaintiff's personal information charged approximately $12,000.00 in purchases to this account. (Id.) Plaintiff learned that the driver's license number used on the identification produced by the individual purporting to be her was wrong by one digit. (Id.¶ 13) Plaintiff found the speeding ticket on the Clerk's

website and noted that the officer had recorded her driver's license number off by one digit. (Id.) Subsequently, Plaintiff learned that the Blue Ash Police had arrested a woman who the Police believed had stolen Plaintiff's identity. (Id. at ¶ 16)

Plaintiff alleges that as a direct and proximate result of the publication of her social security number and other personal identifying information on the Clerk's website, Plaintiff has suffered economic damages, damages to her personal credit rating, and damage to her reputation. (Id. at ¶ 19)

Plaintiff brings this action on behalf of herself and others similarly situated. (Id.¶ 1) Plaintiff brings claims for violation of her right to privacy under the United States Constitution; violation of her Fourteenth Amendment right to personal security; violation of her right to procedural and substantive due process under the Fourteenth Amendment; violation of her legitimate expectation of privacy to be free from unreasonable search and seizure under the Fourth Amendment; violation of her right to privacy under Ohio common law; and publication of private facts under Ohio common law. (Id.¶¶ 30-41) In her first Motion for Leave to File Amended Complaint, Plaintiff seeks to amend her Complaint by properly naming the Hamilton County Commissioners; cite to more specific relief in the form of a court-supervised credit monitoring fund or other prophylactic relief; delete unnecessary facts; and add two additional allegations.[1] (Doc. 29) Plaintiff's Second Motion for

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[1] These allegations are that Defendants have known since 2002 that individuals have been using information gathered from

(Footnote continued)

Leave to Amend Complaint seeks to add two claims. (Doc. 64) The first claim is one for interference with rights common to the public, including the right to privacy, the right to be free from unlawful identity theft, the right to personal security and integrity, and the rights secured by Ohio Revised Code Chapter 1347. The second claim is one for a violation of Ohio's Privacy Act, Ohio Rev.Code § 1347.01, *et seq.*

B. ANALYSIS

1. *Motion to Dismiss Standard*

Defendants' motion is made pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6).

The Sixth Circuit has distinguished between facial and factual attacks among motions to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). *Pritchard v. Dent Wizard Intern. Corp.*, 210 F.R.D. 591, 592 (S.D.Ohio 2002). A facial attack on the subject matter jurisdiction alleged by the complaint merely questions the sufficiency of the pleading. *Ohio Nat. Life Ins. Co. v. U.S.*, 922 F.2d 320, 325 (6th Cir. 1990). In reviewing such a facial attack, a trial court takes the allegations in the complaint as true, which is a similar safeguard employed under 12(b)(6) motions to dismiss. *Id.* Here, Defendants' Motion attacks the sufficiency of the pleadings, and is therefore a facial attack.

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traffic tickets posted on the Clerk's website in order to commit identity theft; and personal information can be shared or sold to others who may hold it for years before using it to commit crimes.

A motion to dismiss under Rule 12(b)(6) requires this Court to construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief. *Meador v. Cabinet for Human Resources,* 902 F.2d 474, 475 (6th Cir. 1990), *cert. denied,* (1990)."However, while liberal, this standard of review does require more than the bare assertion of legal conclusions." *Columbia Natural Res., Inc. v. Tatum,* 58 F.3d 1101, 1109 (6th Cir. 1995); *see also Chapman v. City of Detroit,* 808 F.2d 459, 465 (6th Cir. 1986) ("It is not enough for a complaint . . . to contain mere conclusory allegations of unconstitutional conduct by persons acting under color of state law. Some factual basis for such claims must be set forth in the pleadings.").

2. *Constitutional Right to Privacy*

Defendants argue that Plaintiff has failed to state a claim under 42 U.S.C. § 1983 because she has no constitutional right to privacy in her social security number.

Section 1983 imposes civil liability on a person acting under color of state law who deprives another of the "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Therefore, a plaintiff must allege two elements to establish a *prima facie* case under section 1983:(1) that the action occurred "under color of law"; and (2) that the action was a deprivation of a constitutional right or a federal statutory right. *Parratt v. Taylor,* 451 U.S.

527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

Plaintiff principally relies upon two cases for the proposition that an individual has a constitutional right to privacy in one's social security number: *Smith v. City of Dayton*, 68 F.Supp.2d 911 (S.D.Ohio 1999) and *State ex. rel. Beacon Journal Publishing Co. v. City of Akron*, 640 N.E.2d 164 (Ohio 1994).

In *Smith*, at issue was the release of information from a police officer's personnel file, including his home address and the results of his psychological and mental examinations. 68 F.Supp.2d at 915. This Court recognized that the Ohio Supreme Court in *Beacon Journal* had recognized a federal constitutional right to privacy in one's Social Security number. *Id.* at 917. However, this Court called this holding into doubt based on the Sixth Circuit's decision in *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir.1998). Ultimately, this Court found that under *Kallstrom*, the plaintiff did have a right to privacy in his address. However, the Court finds that the finding of a constitutional right to privacy is not automatic, and cannot be applied to broad categories of information.[2] Instead, this Court must analyze the

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[2] A review of other decisions by the district courts within the Sixth Circuit reveals that district courts have declined to find a constitutional right to privacy in personal information. *Lawson v. Baxter*, 2006 WL 3004069, *2, n. 1 (W.D. Mich. October 20, 2006) (slip op.) (expressing doubt that any privacy right under the Fourteenth Amendment extends to release of plaintiffs social security number or other private information); *Pitts v. Perkins Local School Board*, 2006 WL 1050675, *2 (N.D. Ohio

(Footnote continued)

asserted right under the Supreme Court's decisions in *Whalen v. Roe*, 429 U.S. 589 (1977) and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), and the Sixth Circuit's interpretation of these cases, including *Kallstrom*.

In *Whalen*, the Supreme Court considered whether a New York statute violated a patient's constitutional right to privacy. 429 U.S. at 591. The statute required that the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market. *Id.* The Court recognized two different kinds of privacy interests: (1) the "interest in independence in making certain kinds of important decisions," and (2) the interest "in avoiding disclosure of personal matters." *Id.* at 599-600. The Court found there was no constitutional violation because the New York law evidenced a proper concern for the protection of the individual's interest in privacy. *Id.* at 605-606.[3]

April 19, 2006) (unpublished) (no Fourth Amendment right to privacy in address, phone number, and social security number).

[3] The Court recognized the potential threat to privacy in the collection of vast amounts of data, but because the statute, and its implementing administrative procedures "evidence[d] a proper concern with, and protection of, the individual's interest in privacy," the Court stated that it "need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data-whether intentional or unintentional-or by a system that did not contain comparable security systems." *Id.* at 605-606. Justice Stewart wrote separately and noted the Court's opinion did not support the proposition that broad dissemination of the information

(Footnote continued)

In *Nixon*, the former president brought a constitutional challenge to the Presidential Recordings and Materials Preservation Act, which directed the Administrator of General Services to take custody of presidential tapes and other materials that accumulated during Nixon's presidency, separate the private from the public, and retain the public. 433 U.S. at 425. Nixon argued that the statute violated his right of privacy under the Fourth and Fifth Amendments. *Id.* at 455. The Court found that Nixon did have a legitimate expectation of privacy in private communications between himself and his family, his physician, or his minister. *Id.* at 457 (recognizing that "public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity."). However, the Court held that the statute did not violate Nixon's right of privacy. *Id.* at 465. The Court explained that Nixon's expectation of privacy was outweighed by the limited intrusion of the screening process, by Nixon's status as a public figure, by his lack of any expectation of privacy in the overwhelming majority of the materials, by the important public interest in the preservation of the materials, and by the virtual impossibility of segregating the small quantity of private materials without comprehensive screening. *Id.*

The Sixth Circuit has narrowly construed *Whalen* and *Nixon*, holding that the right to privacy is trig-

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collected by the state would violate the Constitution. *See id.* at 608-609.

gered only when the interest at stake concerns "those personal rights that can be deemed 'fundamental' or 'implicit' in the concept of ordered liberty." *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981) ("Absent a clear indication from the Supreme Court we will not construe isolated statements in *Whalen* and *Nixon* more broadly than their context allows to recognize a general constitutional right to have disclosure of private information measured against the need for disclosure."); *see also Kallstrom v. City of Columbus*, 136 F.3d 1055, 1061 (6th Cir. 1998) ("This circuit has read *Whalen* and *Nixon* narrowly, and will only balance an individual's interest in nondisclosure of informational privacy against the public's interest in and need for the invasion of privacy where the individual privacy interest is of constitutional dimension.") Therefore, the Sixth Circuit has concluded that the Constitution does not encompass a "general right to nondisclosure of private information." *DeSanti*, 653 F.2d at 1090.[4]

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[4] In *J.P. v. DeSanti*, juveniles who had been convicted of a crime challenged the release of personal information to governmental, social, and religious agencies. *Id.* at 1082.The Sixth Circuit rejected their claim, observing that "the fact that the Constitution protects several specific aspects of individual privacy does not mean that it protects all aspects of individual privacy. Nor is there any indication in any [Supreme Court privacy decisions] of a constitutional right to nondisclosure of juvenile court records." *Id.* at 1088. However, the court explained that their opinion should not be read as holding that there is no constitutional right to nondisclosure of private information. *Id.* at 1090. Instead, the court explained that "[o]ur opinion simply holds that not all rights of privacy or interests in nondisclosure of private information are of constitutional dimension, so as to require balancing government action against individual pri-

(Footnote continued)

Therefore, not all disclosures of private information will trigger constitutional protection. The Sixth Circuit requires the following two-step process for analyzing informational right-to-privacy claims: (1) the interest at stake must implicate either a fundamental right or one implicit in the concept of ordered liberty; and (2) the government's interest in disseminating the information must be balanced against the individual's interest in keeping the information private. *Bloch v. Ribar*, 156 F.3d 673, 684 (6th Cir. 1998), *citing DeSanti*, 653 F.2d at 1090-91.

In *Kallstrom v. City of Columbus*, the Sixth Circuit found that under the first step of the above analysis, the plaintiffs had a privacy interest in personal information of a constitutional dimension. 136 F.3d at 1062. The facts of *Kallstrom* are that the City of Columbus disclosed personal information contained in police officer personnel files to defense counsel during a criminal trial in which the officers testified against the defendants. *Id.* at 1058. The court noted that "[i]ndividuals have 'a clearly established right under the substantive component of the Due Process Clause to personal security and to bodily integrity,' and this right is fundamental where 'the magnitude of the liberty deprivation that [the] abuse inflicts upon the victim . . . strips the very essence of personhood.'" 136 F.3d at 1062-63, *quoting Doe v. Claiborne County*, 103 F.3d 495, 507 (6th Cir.

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vacy." *Id.* at 1091. Since *DeSanti*, the Sixth Circuit has found that the dissemination of private information may implicate a constitutional right to privacy. *See, e.g., Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir. 1998); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062 (6th Cir. 1998), *discussed infra*.

1996). The Court explained that "it goes without saying that an individual's 'interest in preserving her life is one of constitutional dimension.'" *Id., quoting Nishiyama v. Dickson County,* 814 F.2d 277, 280 (6th Cir. 1987) (en banc). The court concluded that the disclosure of the officers' addresses, phone numbers, and driver's licenses, as well as the personal information of their family members rose to a constitutional dimension because of the threat to the personal security and bodily integrity of the officers and their family members. *Id.* at 1063. The court therefore proceeded to the second step, and balanced the officers' interests against those of the city. *Id.* The court noted that Ohio's Public Records Act required the state to make available all public records to any person, and for purposes of the case before it, assumed that the interest in public access to these records rose to a compelling state interest. *Id.* at 1064-65. Nevertheless, the court found that the release of the officers' information was not narrowly tailored to serve these interests. *Id.* at 1065. The court explained: "[w]hile there may be situations in which the release of the this type of personal information might further the public's understanding of the workings of its law enforcement agencies, the facts as presented here do not support such a conclusion." *Id.*

In *Bloch v. Ribar,* the Sixth Circuit again found that the plaintiffs had an interest at stake which implicated either a fundamental right or one implicit in the concept of ordered liberty. 156 F.3d at 685. In *Bloch,* a rape victim and her husband claimed that the sheriff violated their constitutional rights by holding a press conference to release the confidential

and highly personal details of the rape by an unknown assailant. *Id.* at 676. The court noted that "[t]he fact that the crime of rape occurred in this case implicates both a private and a public interest, but the details of the rape primarily implicate a private interest until such time as the public interest in prosecution predominates." *Id.* at 685-86. Therefore, the court concluded that "a rape victim has a fundamental right of privacy in preventing government officials from gratuitously and unnecessarily releasing the intimate details of the rape where no penalogical purpose is being served." *Id.* at 686. Moving to the second step of the analysis, the court explained that it appeared that there was no justification for disseminating the details of the rape at the time of the press conference. *Id.* Therefore, the court found that the plaintiffs had raised a cognizable privacy claim under section 1983. *Id.*

Unlike *Kallstrom* and *Bloch,* the Court determines that Plaintiff's alleged privacy interest in her name, signature, home address, birth date, driver's license number, and social security number do not implicate either a fundamental right or one implicit in the concept of ordered liberty. Plaintiff has only identified a risk of financial harm. While the Court is not unmindful of the problems which may result from the release of personal information, it nonetheless is beyond dispute that plaintiff's injury from the release of information in this case bears no equivalence to the potential and actual harm suffered by the *Kallstrom* and *Bloch* plaintiffs, respectively, which harm the Sixth Circuit has found to be protected by the Fourteenth Amendment. Therefore, the Court concludes that based upon the allegations in

the Complaint, Plaintiff is not entitled to relief under section 1983. The Court finds that nothing within Plaintiff's proposed amendments to the Complaint would alter this conclusion.

4. *State Law Claims*

Having found that Plaintiff's constitutional claims are to be dismissed, the Court now turns to Plaintiff's claims under Ohio law for violation of her right to privacy and publication of private facts, as well as Plaintiff's proposed claims for interference with rights common to the public, including the right to privacy, the right to be free from unlawful identity theft, the right to personal security and integrity, and the rights secured by Ohio Revised Code Chapter 1347; and violation of Ohio's Privacy Act, Ohio Rev. Code § 1347.01, *et seq.*

The Court has supplemental jurisdiction over these state law claims because these claims form part of the same controversy as Plaintiff's Section 1983 claim. *See* 28 U.S.C. § 1367(a). However, this Court may decline to exercise supplemental jurisdiction if:

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). When a plaintiff's federal claims have been dismissed on the merits, the question of whether to retain jurisdiction over the state law claims rests within the Court's discretion. *Blakely v. United States,* 276 F.3d 853, 860 (6th Cir. 2002). However, the dismissal of the claim over which the federal court had original jurisdiction creates a presumption in favor of dismissing without prejudice any state-law claims that accompanied it to federal court. *Id.* at 863. In addition, "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 726 (1966). The Court finds that the issues presented are more appropriate for resolution by the state court system, and therefore the Court declines to exercise its supplemental jurisdiction.

C. CONCLUSION

Defendants Greg Hartmann and Hamilton County Board of County Commissioners' Motion to Dismiss (Doc. 35) is hereby **GRANTED**. It is further **ORDERED** that Plaintiff's constitutional claims under section 1983 are **DISMISSED WITH PREJUDICE**; and the remaining claims based on state law are **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CYNTHIA LAMBERT, *Plaintiff-Appellant,* v. GREG HARTMAN, in his official capacity as Clerk of Courts, and HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS, *Defendants-Appellees.*	July 14, 2008 No. 07-3154 **ORDER**

GUY, GILMAN, and McKEAGUE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge or this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk